NO. 80-5554

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JOSEFINA HERRERA,

Appellant

v.

JUAN HERNANDEZ,

Appellee

On Appeal From

THE COURT OF CIVIL APPEALS OF TEXAS

MOTION IN THE ALTERNATIVE TO DISMISS OR TO AFFIRM

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MAY IT PLEASE THE COURT:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

OPINION BELOW

This is an appeal from a decision of the Court of Civil Appeals, Thirteenth Judicial District of Texas, rejecting Appellant's contentions that Section 13.01 of the Texas Family Code, Acts 1975, 64th Legislature,

Chapter 476, §24, denies to an illegitimate child the equal protection of the law and due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellent's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the Appellant's jurisdictional statement.

STATEMENT OF THE CASE

The facts of the case are substantially correct as stated in Appellant's jurisdictional statement, except for the one important fact that Appellee, in his answer in the trial court, emphatically denied paternity of the child.

ARGUMENT

After the decision of this Court in Gomez vs. Perez, 409 U.S. 535 (1973) the legislature of Texas enacted a statutory system, known as Subchapter A of Chapter 13 of the Texas Family Code, effective in September of 1975, to provide illegitimate children and their mothers a statutory

method to establish paternity without the voluntary cooperation of the child's father. As a part of this system Section 13.01 was enacted as a proper limitation on the bringing of such suits. Under this provision the mother of a child would have at least one year, and up to as much as twenty-one months from conception, in which to bring the action to establish paternity. The statute in no way prevents the woman who is en ventre sa mere and not married to the father from filing suit to establish paternity immediately upon discovery of her condition.

In Mathews vs. Lucas, 427 U.S. 495 (1976) it was the holding of this Court that illegitimacy may be a proper classification and that in analyzing such a classification by statute, the question is whether the statutory classification bears a rational relationship to a legitimate governmental interest. The statutory system in question, and the classification therein made, bears a rational relationship to a legitimate governmental interest. It is not an impenetrable barrier to the recovery of support for an illegitimate child. There is no prohibition in Subchapter A to prevent a suit for determination of paternity and support. Because of the nature of the facts to be proved in proving paternity and in defending against a spurious or fraudulent claim of paternity, the State has a legitimate governmental interest in setting limitations on such claims. There are fundamental differences in proof of paternity in legitimate

and illegitimate children. We find in the law with respect to the criminal offense of rape that the doctrine of prompt outcry and short limitation periods are the rule rather than the exception in common law jurisdictions. Similarly, the sex act of consenting parties is not usually executed in public places with any witnesses aside from the participants. Promptness in resolving the responsibility for the natural result of the sex act, that is parantage, would seem to be a most important and legitimate governmental interest. The innocent man, in defending against a spurious or fraudulent claim of paternity, has a right to some protection. The accusing finger of the female is most difficult to turn aside. This is particularly true in view of the difficulties of proof of non-access, access by others, alibi and like defensive matters. Such evidence is notorious for disappearing after a short period of time.

The procedural prescription of the statute does not deny due process, but if followed, provides due process to all illegitimate children. This Court in Nebbia vs. People of the State of New York, 291 U.S. 502 (1934) described due process thusly:

> ...the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Nothing in Section 13.01 prevents a valid claim of paternity.

It only reasonably attempts to make spurious, fraudulent and unconscionably delayed claims less likely of success and attempts to protect the innocent victim of fraud. No violation of the due process requirement is evident.

Appellant's jurisdictional statement cites only two cases in support of the substantiality of the federal question raised. Both of the cases deal with fact situtaions where illegitimate children were absolutely prohibited by state action from receiving benefits accorded legitimate children.

The contentions that Section 13.01 of the Texas Family Code denies to appellant equal protection and due process in violation of the Fourteenth Amendment presents no substantial federal question. Appellee's motion in the alternative to dismiss or to affirm should be sustained.

Respectfully submitted,

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